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ATTACKS ON ADOPTION DECREES BY NATURAL PARENTS TO REGAIN CUSTODY

POVERTY, sickness, illegitimacy, involuntary absence, and similar circumstances sometimes impel a parent to give up a child for adoption.¹ The adoption decree legally transfers to the adoptive parents all the natural parents' rights to the child.² But the decree itself does not assure the adoptive parents that the child will be theirs permanently. Months or years later the natural parents may have a change of heart. In practically every jurisdiction they may challenge the decree, and, if successful, regain custody of the child.³

Attacks on adoption take two general forms: motions to vacate the decree⁴ and habeas corpus proceedings for custody of the child.⁵ In either proceeding

1. A prominent psychiatrist who has served as consultant for numerous New York adoption agencies reports that "the real causes of a mother's surrendering her child are never to be found in external circumstances such as poverty, sickness or illegitimacy alone, but rather in her individual reactions to such environmental factors as part of her total subjective and objective situation. A frequent inner reason for surrendering the baby is the mother's feeling herself emotionally incapable of establishing or maintaining a healthy, mature parent-child relationship. She may feel this way because of an emotional instability or disturbance which pre-dates the birth of the child, and be less able or willing to recognize or reveal such a reason for the surrender than the more obvious and acceptable external hardships. In such instances later alleviation of the original external circumstances would not necessarily alter the basic emotional problem regarding the parental role." Communication to the YALE LAW JOURNAL from Dr. Viola Bernard, dated Feb. 18, 1952, on file in Yale Law Library.

On the common adoptive practices in the 48 states see Comment, *Moppets on the Market*, 59 YALE L. J. 715 (1950). See also BROOKS & BROOKS, *ADVENTURING IN ADOPTION* (1939); LEAVY, *LAW OF ADOPTION SIMPLIFIED* (Legal Almanac Series No. 3, 1948); 4 VERNIER, *AMERICAN FAMILY LAWS* (1936).

2. See statutes compiled in BROOKS & BROOKS, *ADVENTURING IN ADOPTION* 140-61 (1939).

3. See *e.g.*, *Lambert v. Taylor*, 150 Fla. 680, 8 So.2d 393 (1942); *Strode v. Silverman*, 209 S.W.2d 415 (Texas Civ. App. 1948).

See Hautf, *Thwarting Adoptions*, 19 N.C. L. REV. 127 (1941) for an enlightening survey of the chaotic conditions in one state with respect to collateral attacks on adoption decrees.

4. See, *e.g.* *Lambert v. Taylor*, 150 Fla. 680, 8 So. 2d 393 (1942); *Nealon v. Farris*, 131 S.W. 2d 858 (Mo. App. 1939); *Strode v. Silverman*, 209 S.W. 2d 415 (Texas Civ. App. 1948).

5. See *e.g.*, *Finn v. Rees*, 65 Idaho 181, 141 P.2d 976 (1943); *Watt v. Dunn*, 236 Iowa 67, 17 N.W.2d 811 (1945); *Brooks v. DeWitt*, 178 S.W.2d 718 (Texas Civ. App. 1944). See generally, 1 FREEMAN, *JUDGMENTS* §§ 305, 352 (1925).

In addition to the types of attacks mentioned in the text, in eighteen jurisdictions an adoption may be vacated by virtue of annulment statutes. The most common statutes provide for annulment if the child develops feeble-mindedness, epilepsy, insanity, or venereal infection within five years of the adoption. Four states have no precise statutory prerequisites and simply give the court discretion to annul the decree. Five jurisdictions

the decisive question is whether the court which rendered the decree had jurisdiction. Hence courts apply identical criteria in both types of actions; evidence which will cause an adoption to be vacated will also support a habeas corpus proceeding.⁶ Thus, it is sufficient for the natural parent to prove that he received no notice as required by statute⁷ or by the Constitution,⁸ that there was no abandonment of the child,⁹ or that consent was fraudulently obtained.¹⁰ In some states the adoptive parents' failure to meet particular pro-

allow annulment because of misconduct of the adoptive parents, violation of the terms of the adoption agreement, or because of the misconduct of the adopted child. 4 VERNIER, AMERICAN FAMILY LAWS § 264 (1936).

See 5 ARK. STAT. ANN. § 56-110 for an example of a statute which permits annulment of adoptions because of the adoptive parents' unfitness.

6. Compare the cases cited at note 4 *supra* (motions to vacate), with those cited at note 5 *supra* (habeas corpus). In the *Strode* case (motion to vacate), the court looked to whether the parent had consented to the adoption, whether the child had been abandoned, and whether there had been any service of process or notice. In the *Nealon* case (motion to vacate), the court held that fraud in inducing the mother's consent was a sufficient cause to vacate the adoption decree. The *Lambert* case (motion to vacate), held the same.

In the *Watt* case (habeas corpus), the court held that fraud in obtaining the mother's consent was good cause to hold the adoption decree void. In the *Finn* case (habeas corpus), the court looked to the merits of the natural parent's claim, *i.e.* whether there had been abandonment, notice or consent to the adoption. In the *Brooks* case (habeas corpus), the court looked to the question of whether the natural parents had received notice of the adoption proceedings and whether the child had been abandoned.

7. Approximately 11% of the 61 collateral attack cases reported since 1936 were cases where the parent alleged that he received no notice of the adoption proceedings. *E.g.*, *In re Karns*, 236 Iowa 932, 20 N.W.2d 474 (1945); *Commonwealth ex rel. Sutton v. Snyder*, 56 D.&C. 669 (Pa. C.P. 1945); *Grider v. Grider*, 182 Tenn. 406, 187 S.W.2d 613 (1945).

8. *Brooks v. DeWitt*, S.W.2d 718 (Texas Civ. App. 1944).

9. If the natural parents have abandoned the child, formal consent to the adoption is not required. See Note, *Child Abandonment: The Botched Beginning of the Adoption Process*, 60 YALE L.J. 1240 (1951). In collateral proceedings to set aside an adoption, the natural parents often claim that they did not actually abandon the child and that, therefore, their consent should have been obtained. *E.g.*, *Finn v. Rees*, 65 Idaho 181, 141 P.2d 976 (1943).

10. Fraud is the most common allegation. In over half of the 61 reported cases since 1936 the natural parents seeking to attack collaterally an adoption decree claimed at least one count of fraud. For typical cases of the fraud allegation, see *Arnold v. Howell*, 98 Cal. App. 2d 202, 219 P.2d 854 (1950); *Watt v. Dunn*, 236 Iowa 67, 17 N.W.2d 811 (1945); *Falck v. Chadwick*, 59 A.2d 187 (Md. Ct. App. 1948). See also 1 FREEMAN, *op. cit. supra* note 5, § 331.

Fraud in this context means that the parent was misled, either by the adoptive parents or by a third party, as to the consequences of his consent. In *Arnold v. Howell, supra*, a father, called into the navy, consented to his child's adoption. He later claimed that his consent was obtained on the representation that the child would be returned to him when he came out of the service. The court held that the facts were sufficient to void the adoption.

Where a mother's attorney obtained her consent by stating that the child would be

cedural requirements of the adoption statute also renders the decree vulnerable to attack.¹¹

Because these attacks are based upon the original court's want of jurisdiction, the scope of the later court's inquiry is limited to an examination of technical compliance with adoption statutes.¹² But by deciding in this manner, courts are likely to ignore the human interests at stake when an adoption decree is voided or upheld. For example, court opinions seldom discuss the possibility that the child and the adoptive parents have entered into a satisfying new family relationship, while the child and the natural parents may never have formed any lasting attachments.¹³ Nor do courts often consider the natural parent's real motives for attacking the adoption. The circumstances existing when the child was given up may have changed,¹⁴ a parent may repent a hastily given consent,¹⁵ an absent parent may return to find his child

adopted with or without consent, the fraud was sufficient to vacate the adoption decree. *Falck v. Chadwick*, *supra*. An adoption decree was vacated where the mother thought that her consent was a paper giving her child a name. *Lambert v. Taylor*, 150 Fla. 680, 8 So.2d 393 (1942); *cf. In re Sipes*, 24 Wash.2d 603, 167 P.2d 139 (1946) (mother did not know what "adopting" meant; was told that she might still visit child). It was held sufficient fraud to vacate the decree where the mother alleged that she thought her consent would only permit the child to inherit from the adoptive parents. *Barber v. Barber*, 280 Ky. 842, 134 S.W.2d 933 (1939). But *cf. Nealon v. Farris*, 131 S.W.2d 858 (Mo. Ct. App. 1939) (mother signed consent on her doctor's representation that her disease was incurable. Held: insufficient fraud to vacate the adoption.). In no case was motive or intent on the part of those parties committing the fraud given as a controlling factor in the court's decision

11. *Hoenshell v. Patterson*, 225 P.2d 848 (Colo. 1950) (claim that child was not a resident of county where decree was handed down); *In re Bruce*, 269 App. Div. 718, 53 N.Y.S.2d 502 (3d Dep't 1945), *aff'd*, 295 N.Y. 702, 65 N.E.2d 336 (1946) (child did not live with adoptive parents for the full statutory period before the decree was granted); *Smith v. Curtis*, 223 S.W.2d 712 (Texas Civ. App. 1949) (claim that cause was set for hearing less than 40 days after mailing certified copy of petition to the Department of Public Welfare as required by statute and clerk did not note the date of this mailing on the docket).

12. Of 61 cases reported since 1936 only one case was discovered where the court's decision was not controlled by a finding of a pre-adoption defect. *Rhodes v. Lewis*, 246 Ala. 241, 20 So.2d 206 (1944) (decision to be based on "best interest of child"). For more typical treatment see *In re Bruce*, *supra* note 11. See also *Strode v. Silverman*, 209 S.W.2d 415 (Texas Civ. App. 1943).

13. The age at which the child was separated from his natural parents is seldom considered. See *Watt v. Dunn*, 236 Iowa 67, 17 N.W.2d 811 (1945); *Nealon v. Farris*, 131 S.W.2d 858 (Mo. Ct. App. 1939); *Adoption of Montgomery*, 167 Pa. Super. 635, 76 A.2d 240 (1950). Nor is the fact that the natural parent lived or closely associated with the child after adoption considered. See *Bottoms v. Carlz*, 310 Mass. 29, 36 N.E.2d 379 (1941).

14. See *e.g. Nealon v. Farris*, 131 S.W.2d 858 (Mo. Ct. App. 1939) (parent consented to the adoption while thinking she was incurably ill; illness later cured).

15. See *e.g., In re Sipes*, 24 Wash.2d 603, 167, P.2d 139 (1946) (mother signed consent without fully understanding the consequences of adoption).

adopted,¹⁶ or the parent's desire to get the child back may be a manifestation of emotional instability.¹⁷

Removing a child from a successful adoptive home may cause hardship both to the child and to the adoptive parents. Over half the children adopted are illegitimate,¹⁸ and the majority are less than one year old when they begin living with their new family.¹⁹ Generally such children come from homes which were unwilling or unable to care for them. By contrast, adoptive parents sought their child and demonstrated ability to care for him.²⁰ Moreover, the emotional relationship of child and adoptive parent may be as good as or better than the natural one, for this relationship depends not on biological

16. See *e.g.*, *In re Karns*, 236 Iowa 932, 20 N.W.2d 474 (1945) (father returning home after service in the armed forces discovered that his child had been adopted in the interim).

17. Psychiatrists "find a high incidence of emotionally unsound reasons for attacking the adoption decree; sometimes these motives are an extension of an emotional disturbance involved in the parent's prior decision to surrender which, in turn, may have been related to her personality make-up prior to the child's birth. A change of mind as to keeping the baby, if it occurs because of emotional instability, leads to non-optimum conditions for the raising of the child. For example, an unmarried mother torn by conflicting feelings and wishes, such as duty to the baby versus desire for personal freedom, may lack the inner resources or opportunities for appropriate and effective guidance towards optimum conflict-resolving at the stage of surrender. Instead of resolving conflicts then, she may unwittingly perpetuate it by impulsively acting on first one and then the opposite side of her conflict. She may surrender the baby in spite of strong guilt feelings at doing so, and then seek to regain the child to assuage the guilt feelings. Recovering the baby, however, may not have this effect, but rather intensify her resentment against it as a burden. The difficult emotional and social experience of unmarried motherhood is so conducive to painful personal conflict that changeability about decision to surrender is so frequent as to be characteristic. When premature, impulsive or over-conflicted decision to relinquish the baby occurs, the subsequent reverse desire to regain the baby is often equally impulsive and emotionally unsound so that the parent and child suffer accordingly." Communication to the YALE LAW JOURNAL from Dr. Viola Bernard, dated Feb. 18, 1952, on file in Yale Law Library.

18. BROOKS & BROOKS, *op. cit. supra* note 1, at 20. See Brown, *Adoption of Children*, 31 SOCIOLOGICAL REV. 44 (1939) for British statistics (seventy-nine per cent of children adopted in London are illegitimate; sixty-six per cent for all of England and Wales).

19. A study of 2,414 adoptions in Minnesota revealed that the median age of the children at placement was 8.10 months. Twenty-five per cent were 3.14 months or younger, and only twenty-five per cent were 21.17 months or older when adopted. Of this older group the median age was 31.83 months. Leahy, *Some Characteristics of Adoptive Parents*, 38 AM. J. SOC. 548 (1933). See also CHILD ADOPTION RESEARCH COMMITTEE, A FOLLOW UP STUDY OF ADOPTIVE FAMILIES (1951).

20. The adoptive home is generally superior to the average in economic status. The proportion of adoptive fathers in professional, business, or managerial positions is three to four times that of adult males in general. Adoptive parents are usually somewhat older than true parents of children the same age with the majority between twenty-eight and forty-five, and they have been married approximately ten years. Less than one per cent are unmarried. Leahy, *supra* note 19, at 548. See also Brown, *supra* note 18, at 44.

ties but on the amount of healthy parental feeling the adult manifests.²¹ Vacating the adoption decree and uprooting the child from his new environment may create in him a host of psychological and emotional problems which are accentuated because of his vulnerable age and his former upheaval.²²

On the other hand, not all adoptions are successful. Sometimes parent and child reject each other,²³ or an improper adoptive environment produces emotional instability in the child.²⁴ Inadequate pre-adoption investigation may result in placing the child with unfit parents,²⁵ or a satisfactory adoptive

21. There is a popular misconception that natural mother love is the best kind. The real determinant is the amount of healthy parental feeling an individual—whether natural or adoptive parent—has, and this depends upon an individual's makeup and not upon whether the child is natural. Communication to the *YALE LAW JOURNAL* from Dr. Viola Bernard, dated Feb. 18, 1952, on file in Yale Law Library.

The pioneer study in the field of foster relationships, *THEIS, HOW FOSTER CHILDREN TURN OUT* (N.Y. State Charities Aid Ass'n Pub. No. 165, 1924), investigated 910 children placed in foster homes who were eighteen or over at the time the study was made. Children placed when young were "almost invariably" accepted by the family as their own children. *Id.* at 60. Only four per cent of the children placed when under five had a wholly unsatisfactory relationship. *Id.* at 118. Where the children were adopted by the foster parents, the study reports: "Of all the foster relationships the closest is usually that existing between foster parents and children who have been legally adopted. It most nearly resembles the natural tie between parents and children in understanding and affection, indeed, it often seems a complete substitute for it." *Id.* at 119.

"[T]he fact of either blood relationship to persons shaping the environment or its absence makes no difference. Adopted children, where presumably only environment is operative, behave in a manner similar to own children where both heredity and environment are operative." Leahy, *Nature, Nurture, and Intelligence*, 17 *GENETIC PSYCHOLOGY MONOGRAPHS* 299, No. 4 (1935). Such attributes as self-confidence, drive, industry or their converse are not differently distributed in adoptive children, nor do natural parents provide a more stimulating emotional environment than adoptive parents. *Id.* at 291 (results based on emotional stability tests given to a group of over 200 adopted children and the same number of natural children). For other studies see those cited in Brooks & Brooks, *op. cit. supra* note 1.

22. Clothier, *Some Aspects of the Problem of Adoption*, 9 *AM. J. ORTHOPSYCHIATRY* 598, 608 (1939). See also Kestenberg, *Separation from Parents*, 3 *NERV. CHILD* 20 (1943).

For an enlightening report of how a child may develop his love for the adoptive parents when the adoption is successful see Clothier, *supra* at 612.

23. A study of 60 adopted children brought to a child guidance clinic because they were "problems," revealed that the fault in 25 cases was attributable to the adoptive relationship. Either the child or the parent had rejected the other. Although the main reason for such rejection was said to be improper reasons of the adoptive parents for wanting a child, the study suggests that the same incidence of rejection may be found in natural homes. In 25 cases the "problem" was not in any way connected with the adoption. Epstein & Witmer, *A Study of Sixty Adopted Problem Children*, 8 *SMITH COLL. STUDIES IN SOCIAL WORK* 369 (1938).

24. For example, see the discussion in Towle, *The Evaluation and Management of Marital Situation in Foster Homes*, 1 *AM. J. ORTHOPSYCHIATRY* 271 (1931) (foster environment detrimental to the child because of marital difficulties).

25. See Crutcher, *Some Misplaced Children*, 56 *SURVEY* 83 (1926); Comment, *Moppets on the Market*, 59 *YALE L.J.* 715 (1950).

home may later become unfit because of divorce, death, or other disruptive factors.²⁶ In addition, the facts of a case often reveal a strong equity in favor of the natural parents although the adoption decree is technically flawless.²⁷

An enlightened approach to the problem of post-adoption conflict between natural and adoptive parents is possible only if the court considers the best interests of the child and the respective parents, rather than technicalities. A court should, for example, try to discover the fitness of the respective parents to have custody of the child. This determination would require repeated conferences with each set of parents, plus a judge with enough psychological training properly to evaluate the competing personalities. Further, a court should ascertain whether the natural parent's original emotional or circumstantial difficulties have been overcome. It should also compare the child's position in the adoptive family with his would-be situation in his natural home in terms of love, affection, and normal family relationship. In making this comparison the court should look to such factors as the child's age when adopted, the length of time since the adoption, the pre-adoption and the post-adoption attachments formed by the child with his respective parents, and the possibility of an adverse psychological reaction in the child if he were removed from his present environment. The court should also examine the parent's motive in attacking the adoption, the adoptive parents' reasons for wanting to keep the child, the number of other children in each family and the adopted child's adjustment to them.²⁸

26. See Epstein & Witmer, *supra*, note 23. Ten of the sixty adopted problem children studied were emotionally insecure because of changes in the adoptive environment after the decree.

27. For example, in *Nealon v. Farris*, 131 S.W.2d 858 (Mo. Ct. App. 1939) the court refused to vacate an adoption decree where the mother had consented during an "incurable" illness and later regained her health. The court held that there was no fraud against the mother when she was told that her illness was incurable. Absent other defects in the adoption decree, it could not be vacated. The fact that the child had lived with its real parents for a number of years before the adoption and the fact that the mother sought to regain custody only a year after the adoption did not persuade the court. The degree to which the child had become accustomed to the new environment was scarcely considered.

See also *Bottoms v. Carlz*, 310 Mass. 29, 36 N.E.2d 379 (1941). A mother had permitted close relatives to adopt her child while she continued to live with it in the relative's home. Some years later, the mother married and wanted to take the child with her. The court refused to vacate the adoption and did not even consider the fact that the child in all probability knew and understood that the plaintiff was his real mother nor the fact that the mother and child were in close daily association for a number of years.

28. The court's decision in these cases should depend upon the outcome of a very intensive study of the parents involved and also the child himself. All the factors relative to the home situation before the child was placed for adoption, the motivations of the parents at that time, and an evaluation of their present situation and the motivations which now prompt them to have the child returned to them should be included. Communication to the YALE LAW JOURNAL from Dr. George E. Gardner, Director, Judge Baker Guidance Center, Boston, Mass., dated Jan. 2, 1952, on file in Yale Law Library.

Dr. Viola Bernard also stresses the fact that a thorough investigation of the adoptive and natural parents and home should be made. Only when the adoptive home and

The problem of establishing proper criteria for intelligent decisions when adoptions are attacked is magnified by the inadequacy of present-day courts as agencies for making the necessary determinations. The court's time and personnel are generally much too limited for the thorough home and personality investigations required. And even if time were available, few judges have the training necessary to evaluate psychological data and form the proper conclusions therefrom. One solution is suggested by an experiment now being conducted in the New York City Domestic Relations Court, where problems concerning children are referred to a psychiatric board for evaluation and suggestions.²⁹ A second possible procedure is for the judge to seek aid from the same sources available to him in an original adoption: either a qualified adoption agency or the state public welfare agency. These agencies have trained personnel to make the necessary home and personality investigations, and they generally have access to psychiatric advice when required.³⁰

parent-child relationship is poor should a court consider removing a child, since "a paramount cause of emotional handicaps and maladjustments in later life is the separation in childhood from the home and parents that the child knows, regardless of whether this home be a natural home from which the child is separated through various vicissitudes, or his original adoptive home." Communication to the YALE LAW JOURNAL from Dr. Viola Bernard, dated February 18, 1952, on file in Yale Law Library.

The most recent study on adoption, CHILD ADOPTION RESEARCH COMMITTEE, A FOLLOW UP STUDY OF ADOPTIVE FAMILIES (1951), outlines the factors and method of evaluating a home in terms of environment and personalities. The following criteria are used: affection, admiration and criticism, ease or tension, patience and indulgence, freedom, time spent with child by parents. *Id.* at 142-7. This rating scale system is based upon casework observations, and requires a professional person with special experience to do the appraisal. *Id.* at 149. This system, however, is not infallible. *Ibid.*

29. This experiment is currently being conducted under a grant from the Russell Sage Foundation.

30. For the role which these agencies play see LEAVY, *op. cit. supra* note 1, at 45, 61.